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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/656,070	09/05/2003	David Charles Lyons	12929.1062USC1	8343
23552	7590	10/01/2004	EXAMINER	
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			COCKS, JOSIAH C	
			ART UNIT	PAPER NUMBER
			3749	

DATE MAILED: 10/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/656,070

Applicant(s)

LYONS ET AL.

Examiner

Josiah Cocks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 05 September 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 27-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 27-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 September 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 12/10/03, 6/3/04.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Response to Amendment

1. Receipt of the Preliminary Amendment filed 6/3/2004 is acknowledged.

Drawings

2. The drawings filed 9/5/2003 are accepted by the examiner.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

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5. Claims 27-32, 36-45, 48-50, 52, 53, and 55-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. No. 5,941,237 to Shimek ("Shimek '237") (cited by applicant) in view of US Pat. No. 6,361,725 to Sinsley ("Sinsley '725") (cited by applicant).

Shimek '237 discloses the gas burner and methods substantially as described in applicant's claims 27-32, 36-45, 48-50, 52, 53, and 55-59. In particular, Shimek '237 shows in Figs. 15-18 a method of forming a gas burner and panel, a method of assembling a fireplace and gas burner for a gas fireplace, comprising:

- a burner panel (14) defining a top surface and a bottom surface;

- a bottom member (17) coupled to the burner panel (14);

- wherein the burner panel (14) defines at least one aperture (20, 48, 63) to provide a gas/air mixture to the top surface of the burner panel (14); and

- wherein the burner panel (14) comprises a molded material (see col. 2, lines 11-19); and

- wherein the burner panel (14) comprises a bottom panel of a combustion chamber enclosure (see Fig. 12).

Shimek '237 does not disclose the use of a compression molding method to make the burner panel.

Sinsley '725 teaches the use of a compression injection method for ceramic-fiber artificial logs or panels used in gas fireplaces (see col. 1, lines 55-62). This injection method is termed "pressure injection" and "pressure collation" (see col. 4, lines 47-56) and involves the application of the mold slurry under a positive pressure (see col. 3, lines 25-29), which is regarded by the examiner as placing the molded material in compression.

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Therefore, in regard to claims 27-32, 36-45, 48-50, 52, 53, and 55-59, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify burner panel material of Shimek '237 to be formed by the compression injection molding method of Sinsley '725 as this method provides burner panels that have a lower moisture content which reduces the primary oven drying cycle (see Sinsley '725, col. 4, lines 47-52) and provides a much finer texture detail to finished surface than traditional vacuum molding processes (see Sinsley '725, col. 4, lines 52-56).

6. Alternatively, claims 27-32, 36-45, 48-50, 52, 53, and 55-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over US Pat. No. 5,941,237 to Shimek ("Shimek '237") (prior art of record) in view of US Pat. No. 3,758,317 to Moore ("Moore").

Shimek '237 discloses the gas burner and methods substantially as described in applicant's claims 27-32, 36-45, 48-50, 52, 53, and 55-59. In particular, Shimek '237 shows in Figs. 15-18 a method of forming a gas burner and panel, a method of assembling a fireplace and gas burner for a gas fireplace, comprising:

- a burner panel (14) defining a top surface and a bottom surface;

- a bottom member (17) coupled to the burner panel (14);

- wherein the burner panel (14) defines at least one aperture (20, 48, 63) to provide a gas/air mixture to the top surface of the burner panel (14); and

- wherein the burner panel (14) comprises a molded material (see col. 2, lines 11-19); and

- wherein the burner panel (14) comprises a bottom panel of a combustion chamber enclosure (see Fig. 12).

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Shimek '237 does not disclose the use of a compression molding method to make the burner panel.

Moore teaches a ceramic shaped refractory for use in household burners and method of forming the refractory (see col. 8, lines 32-35 and 61-69) where compression molding is described as a "useful technique" for forming the panels and is described as being equivalent to vacuum and pressure forming methods (see col. 8, lines 45-48).

Therefore, in regard to claims 27-32, 36-45, 48-50, 52, 53, and 55-59, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the burner panel and method of forming of Shimek '237 to incorporate the compression molding method as taught in Moore as this molding method is desirably recognized as a useful technique for forming shaped ceramic parts for household burners and is considered equivalent to vacuum and pressure forming methods (see Moore, col. 8, lines 32-69).

Double Patenting

7. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

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A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

8. Claims 27-59 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3, 5, 6, and 9-26 of copending Application No. 09/781,149. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims 27-59 are slightly broader in scope (e.g. claiming combustible gas as opposed to gas/air mixture claimed in 09/781,149) but are claiming the same invention as claims 1-3, 5, 6, and 9-26 of copending Application No. 09/781,149.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Allowable Subject Matter

9. Claims 33-35, 46, and 47 contain allowable subject matter and would be allowed upon filing of a Terminal Disclaimer as noted above.

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10. Claims 51 and 54 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims and upon filing of a Terminal Disclaimer as noted above.

Conclusion

11. This action is made non-final. A THREE month shortened statutory period for reply has been set. Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) months from the mailing date of this communication.

12. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://portal.uspto.gov/external/portal/pair>. Any questions on access to the Private PAIR system should be directed to the Electronic Business Center (EBC) at (866) 217-9197 (toll-free).


13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Josiah Cocks whose telephone number is (703) 305-0450. The examiner can normally be reached on weekdays from 7:30 AM to 5:00 PM.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ira Lazarus, can be reached at (703) 308-1935. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0861.

jcc
September 28, 2004


JOSIAH COCKS
PRIMARY EXAMINER
ART UNIT 3749